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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-39

HEINZ WABNIK

Petitioner,

—v.—

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Comes now Maurice Brill, attorney for the petitioners, and hereby petitions of a writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered June 8, 1971.

Opinions Below

The Opinion of the Court of Appeals (App. A, pp. A1-A5, *infra*) is not yet reported.

Jurisdiction

The judgment of the panel of the Court of Appeals was entered June 8, 1971 (App. B, pp. B1-B2, *infra*). The jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

Question Presented

Whether a high degree of suspicion without more that a crime is being committed is synonymous with probable cause to justify the warrantless search of the trunk of petitioner's automobile by Port Authority policemen.

Statement

On September 16 and 22, 1970, a hearing was held in the Federal District Court for the Eastern District of New York on petitioner's motion to suppress evidence obtained as a result of a warrantless search of petitioner's automobile. The district court granted the motion and suppressed the evidence. On appeal, the United States Court of Appeals reversed the order of the district court which granted the suppression (App. B. p. B2). Petitioner and a co-defendant were charged with violating the provisions of Title 18 U.S.C. §§ 659 and 371.

The relevant events took place at approximately 7:10 p.m. on November 25, 1969. New York Port Authority detectives were seated in an automobile in the BOAC parking lot at John F. Kennedy International Airport on an assignment unconnected and unrelated to the present case (H. 13-16, 43-45).* At this time petitioner, and one Michael Sampayo, driving a black Comet entered the lot and parked approximately three or four car lengths to the right and one car length to the rear of the detectives' car (H. 46). Within a few minutes a white Ford station wagon bearing Pan American insignia entered the lot and stopped directly behind the Comet (H. 18, 45-46). Petitioner and Sampayo

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* Reference Key: H. refers to Minutes of suppression hearing.

dressed in white overalls, got out of the Comet, opened the right rear door of the station wagon, removed two cartons and rapidly placed them in the trunk of the Comet (H. 18, 46). Although the transfer of the cartons was done hurriedly, neither petitioner nor his companion acted furtively. They did not look around to see if anyone was watching their transfer of the cartons (H. 174-176). The driver of the station wagon remained behind the wheel during the entire operation. Neither he nor petitioner and his companion said anything at all. (App. A. p. A3, *infra*), nor was the driver of the station wagon questioned (H. 24). The station wagon drove off and as the black Comet began to back out it was stopped by Detectives John Hertz and Joseph Bechko. Detective Hartz showed his badge to petitioner and his companion, and asked petitioner for his driver's license and registration. After inspecting these items, and without any further conversation or questions regarding identity, employment or the cartons themselves, Detective Hartz asked petitioner to open the trunk of the Comet. Petitioner complied. (H. 19, 24-27, 47-48, 57, 176-177). In the trunk were found two cartons with Pan American Airway bills attached. Petitioner and his companion were then placed under arrest (H. 20-21).

Prior to the time the detectives caused the trunk of the Comet to be opened, the officers observed no writings or marks of identification on the cartons, did not know what was contained in the cartons, did not know to whom the cartons belonged and had no information of any theft occurring from Pan Americans cargo (H. 24, 26, 33, 169-171).

When detective Hartz was asked what led him to stop the Comet, he replied "The location, the fastness of the

exchange and the oddity of the exchange being made by a Pan Am station wagon to a private vehicle containing people just dressed in Pan Am coveralls'' (H. 40-41).

Detective Beichko stated the reason for his action twice. On the first occasion he stated:

> ''Well, because at first when the vehicle came in with the two gentlemen in it, with the black Mercury, they just sat there and the next thing this Pan Am station wagon comes up and they take boxes out of it. Now, this didn't look right, because this is not normally done. . . . So that aroused our *suspicions* right there, because if a freight belonged to them, they would have been at Pan Am's building to pick it up with the proper pick-up orders. It wouldn't have been delivered to him in the lot. And if they were going to rendevous with their own personal belongings, this would have been done in front of Pan Am's lot, because the parking lot is tremendous also.
>
> But because they were doing this in the back rows and because it was the Pan Am station wagon with this civilian vehicle, this aroused our *suspicion* and this is why we stopped them (Emphasis supplied) H. 81-83).

> Later Detective Bechko stated his reason for stopping the Comet was that he 'felt that this operation wasn't normal and we didn't believe it was a legal transaction' . . . . 'Because I had never seen this action go on before. If a person was legal to the property I don't think he would have made the transfer in the BOAC parking lot. I think he would have made it in Pan Am's building or in Pan Am's parking lot'' (H. 147).

Elisa Ghumiem, an official of Pan American Airways testified as to Pan American's cargo procedures. Ghumiem stated that there was no rule prohibiting a Pan American

employee from picking up his own package by presenting the proper papers at the cargo building; that an employee who picks up his own package may take it out of the cargo building, and that there is no rule prohibiting an employee from picking up his own package during his free time and taking it to his own automobile (H. 144-150).

At the conclusion of the hearing, the District Court found that although the detectives had "plenty of reason to be suspicious . . . they did not have probable cause to believe that a crime had been committed" (H. 6).

The Court of Appeals reversed the order of the district court. The court found that on the basis of the detectives' experience; their knowledge of Pan American's cargo procedures; their knowledge of the many thefts of airport cargo; their suspicions concerning the transfer of the cartons, coupled with events of the transfer without conversation and documents at night in BOAC's lot from a pan Am station wagon was sufficient probable cause for the detectives to believe "that a crime was being committed before their eyes" (App. A. pp. A3-A5, *infra*).

ARGUMENT

Petitioner's Activity in Transferring two Unidentified Cartons to his Car, Innocent in Itself, Does not Create Probable Cause for a Warrantless Search of his Car Because Such Activity Created a Suspicion in the Minds of Experienced Port Authority Detectives.

Probable cause exists where the facts and circumstances within a law enforcement officer's knowledge, of which he has reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the

belief that an offense has been or is being committed. It is more than mere suspicion. *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968); *Henry* v. *United States*, 361 U.S. 98, 102 (1959); *Draper* v. *United States*, 358 U.S. 307, 313 (1959).

We do not have here the situation where officers were acting upon information of a reliable informant, or upon their knowledge and observations or surveillances based on the information of a reliable informant, or upon clear indicia that a crime was being committed in their presence, i.e., smell of mash, passage of narcotic drugs, etc.

In determining probable cause for a warrantless search, the facts of each particular case must be examined. In examining the facts of a warrantless search, the standards for such a search are more stringent than is required for the issuance of search warrant by a judicial officer. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 394 U.S. 401 (1969); *McCray* v. *Illinois*, 386 U.S. 300, 304-305 (1967).

A review of the facts here, in a view most favorable to the Government, clearly establishes that the Port Authority detectives were acting solely on suspicion, and so stated they were, when they searched petitioner's car (H. 81-83; Statement, *supra*).

The officers observed two men in white coveralls transfer two cartons from a Pan Am station wagon to the trunk of their Comet in BOAC's parking lot. The transfer was done in a rapid fashion but without any furtiveness or conversation. To the average person this event would arouse, other than perhaps curiosity, no interest much less sus-

picion. To experienced Port Authority detectives, this event might and could arouse their suspicions. But from either view, the observation of the event in and of itself could not be claimed to be the commission of a crime. The officers in the area on another matter, had no knowledge or information of any sort that a theft had taken place, or was to take place or, that the cartons belonged to Pan Am or anyone else other than petitioner and his companion.

The district court found on the evidence, that the detectives had reason to be suspicious of the activity they observed but that the detectives did not have probable cause to believe a crime had been committed to validate a warrantless search of petitioner's car. (See Statement, *supra*)

The Court of Appeals disagreed with this finding. The court was of the opinion that although the direct observation of the detectives of the transfer of the two cartons at night without conversations or documents may not have risen to the status of probable cause, certain background information within the realm of the detectives' experience made possible the transformation of suspicion to probable cause. This background information consisted of:

One. The detectives' experience as Port Authority officers. This factor is of course true but it is no more and no less than that possessed by any law enforcement officer in his special or general field of endeavor. Such experience does not establish probable cause. It would create a suspicion in the mind of an experienced policeman;

Two. The knowledge the detectives possessed as to Pan Am's cargo procedures. Again this information is just another facet of the detectives' experience and is normally information a law enforcement agent would know in his

particular area of operation. As part of the detectives' experience it would be a factor in creating a suspicion in their mind as to the activity they observed.

In essence, the question here is whether the observation of certain activity, innocent in itself, but which created suspicion in the minds of experienced officers, became probable cause based on suspicion for a warrantless search of an automobile. It is submitted that the creation of suspicion upon suspicion is still suspicion. It does not add up to probable cause unless some further and separate ingredient appears which transforms or upgrades suspicion into probable cause.

The Court of Appeals based on the evidence set forth here stated that "it would be difficult to imagine an innocent explanation for the activity". (App. A. p. A5). The test is not whether the officers could imagine an innocent explanation for the activity or even a guilty explanation but whether there was probable cause for the search. Suspicion, imagination, or surmise still fall short of the mark of probable cause that a crime had been committed.

Nor do we believe that the test as to probable cause here is one in which the officers based on their observations could conclude that what they saw was "'more likely than not a criminal transaction" (App. A. p. A5). Such a test is consistent with conclusions made on the basis of suspicions. It does not aid in establishing probable cause. The Court of Appeals' reliance on this test, citing *Draper* v. *United States*, 358 U.S. 307, 313 (1959), is not supported by *Draper* as to the facts here.

In *Draper*, the officer involved relied not only on his own knowledge but on trustworthy information which his knowledge and observations corroborated. There the elements of probable cause were present. The officer had to determine, having grounds for probable cause, whether it was more likely than not that criminality was involved. Such is not the case here.

We further believe that if the information possessed by the officers here was presented to a magistrate for a search warrant, it would have been deficient. Probable cause was not established in this case until the officers found the cartons after an illegal search. Such a discovery does not validate an otherwise illegal search.

CONCLUSION

For the Reasons Above Stated, Petitioner's Constitutional Rights Under the Fourth Amendment was Violated. The Petition for the Writ of Certiorari Should be Granted.

Respectfully submitted,

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APPENDIX "A"

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 763—September Term, 1970.

(Argued April 29, 1971 Decided June 8, 1971.)

Docket No. 35801

UNITED STATES OF AMERICA,

Appellant,

—v.—

HEINZ WABNIK and MICHAEL SAMPAYO,

Appellees.

Before:

HAYS and FEINBERG, *Circuit Judge*, and
BLUMENFELD,* *District Judge.*

Appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, suppressing evidence obtained as a result of a search of defendant Wabnik's automobile.

Reversed.

* Of the United States District Court for the District of Connecticut, sitting by designation.

Appendix "A"—
Opinion of the United States Court of Appeals

DAVID G. TRAGER, Assistant United States Attorney (Edward R. Neaher, United States Attorney, Eastern District of New York, Thomas R. Pattison, Assistant United States Attorney, on the brief), *for Appellant.*

MAURICE BRILL, New York, N. Y., *for Appellee Wabnik.*

ALLAN KRITZ, New York, N. Y. (Lifshutz & Kahn, New York, N. Y., on the brief), *for Appellee Sampayo.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of New York suppressing evidence obtained as a result of a search of the defendant Wabnik's automobile. The United States appeals pursuant to 18 U.S.C. §3731 (1964). We reverse the order below, since we find that the detectives who conducted the search of the automobile had probable cause to believe that a crime was being committed.

The relevant events took place on the evening of November 25, 1969. Officers Harz and Bichko, detectives of the New York Port Authority Police Department, were seated in an automobile in the BOAC parking lot at John F. Kennedy International Airport. Their assignment was to follow an employee of BOAC expected to appear shortly. Appellees drove into the BOAC parking lot in a black Comet at approximately 7:10 p.m. and parked about 20 feet away from the detectives. The latter noted that both

men in the Comet were wearing white coveralls. Within a few minutes, a white Ford station wagon bearing Pan American insignia entered the lot and stopped directly behind the Comet. The appellees immediately got out of the Comet and, without a word, opened the right read door of the station wagon, removed two cartons, and hurriedly placed them in the trunk of the Comet. The driver of the Pan American station wagon remained behind the wheel during the entire operation. Neither he nor appellees said anything at all.

After having observed these activities, the two detectives got out of their vehicle and headed toward the Comet. While they were approaching, the Pan American station wagon backed out and drove away. The Comet had started to back up when it was stopped by Detective Harz. He showed his badge and asked the driver Wabnik to produce his license and registration. After inspecting these, Harz told Wabnik to open the trunk, and Wabnik complied. When the detectives found two cartons with Pan American airway bills attached, they placed the appellees under arrest.

In addition to the facts recited above, the court is entitled to consider other facts known to the detectives (*Carroll* v. *United States*, 267 U.S. 132, 159-60 (1925)) in deciding whether "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that [stolen goods were] being transported in the automobile which they stopped and searched." *Id.* at 162. Both the detectives

here were long experienced. Officer Harz had been a member of the New York Port Authority Department for over 16 years and had been on duty at J.F.K. airport for about 22 months. Officer Bichko had been with the Authority for 18 years and had been assigned to the airport for about 8 years. Both officers testified that they knew that Pan American cargo would not normally be handled or transferred except at Pan American's own facilities and indeed that they had never observed such a transfer as that involving appellees during the entire time they had been employed at the airport. That there was a more than adequate basis for the knowledge of the officers at the time of the seizure was confirmed by an official of Pan American who testified: that Pan American cargo is delivered to consignees only at the Pan American cargo building which has its own lot; that Pan American does not deliver; that Pan American station wagons are not used to move cargo; that Pan American employees may not use their own automobiles to transport Pan American cargo; and that if Pan American employees receive cargo personally, they are required to follow the same procedures as other consignees. He further pointed out that the BOAC parking lot is neither on nor near the direct route employed by Pan American cargo vehicles and stated that the BOAC parking lot is never used for authorized transfers of Pan American cargoes. In short, the events observed appeared to the detectives who were familiar with the procedures of cargo transfer at the airport to be highly unusual. Moreover, the detectives were aware of the well-known fact that many thefts of cargo had occurred at the airport.

When this background information is considered in conjunction with the facts observed, viz., the obviously prearranged manner of transferring the cartons hurriedly without conversation, the Pan American station wagon in the BOAC lot, the lack of documents, and the nighttime setting, it would be difficult to imagine an innocent explanation for the activity. The detectives were fully justified in believing that a crime was being committed before their eyes. Cf. *Bell* v. *United States,* 254 F.2d 82 (D.C. Cir.), cert. denied, 358 U.S. 885 (1958).

In determining whether there was probable cause for the action taken by the detectives, we are required to apply a common sense rather than a hypertechnical standard. *United States* v. *Ventresca,* 380 U.S. 102, 108-9 (1965); *Brinegar* v. *United States,* 338 U.S. 160, 175 (1949). The test is whether ordinary, reasonable men, possessed of the experience and knowledge of these detectives would conclude that the transaction described above was more likely than not a criminal transaction. See *Draper* v. *United States,* 358 U.S. 307, 313 (1959). Since the detectives had probable cause to believe that a crime was being committed, they were not required to obtain a search warrant or to arrest the defendants before searching the automobile in which the stolen cargo was found. *Carroll* v. *United States, supra;* see *Cooper* v. *California,* 386 U.S. 58 (1967).

Reversed.

APPENDIX "B"

Judgment of Reversal of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-one.

Present:

HON. PAUL R. HAYS,
" WILFRED FEINBERG,
Circuit Judges,
" M. JOSEPH BLUMENFELD,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

HEINZ WABNIK, MICHAEL SAMPAYO and JOSE SANZA,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

Appendix "B"—Judgment of Reversal of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. Daniel Fusaro,
Clerk

A. Daniel Fusaro
By Vincent A. Carlin,
Chief Deputy Clerk